

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D62/99

Profits Tax – real property – whether the gains arising from the disposition of a property was liable for profits tax.

Panel: Ronny Wong Fook Hum SC (chairman), Gidget Lun Kit Chi and David Wu Chung Shing.

Date of hearing: 28 June 1999.

Date of decision: 8 September 1999.

The taxpayer is an indigenous villager in the New Territories. On 10 April 1992 the taxpayer was assigned a land lot and on the same day an application was made in the name of the taxpayer to the District Lands Office for a licence to build a small house on the lot. On 1 March 1994, the District Lands Office issued a certificate of compliance certifying that all the positive obligations under the licence had been complied with. The taxpayer sold all 3 storeys in the small house between the dates of 11 July and 31 August 1994.

Held:

- (1) One would expect a bona fide taxpayer to appear at the hearing giving detailed evidence on the circumstances of his acquisition, his finance and his aspirations pertaining to the lot and the small house erected thereon. In the light of the serious challenge by the Revenue, one would further expect documentary evidence to refute the conclusion of the Commissioner. There was not a shred of evidence to support the taxpayer's bare assertion that he purchased the lot with the view of establishing his residence therein. The taxpayer did not even try to discharge the onus resting on him in this appeal.
- (2) The appeal is frivolous and an abuse of the process of the Board. The taxpayer was ordered to pay costs in the sum of \$3,500.

Appeal dismissed and a cost of \$3,500 charged.

Ngan Man Kuen for the Commissioner of Inland Revenue.
Taxpayer represented by his representatives.

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Decision:

Background

1. The Taxpayer is an indigenous villager in the New Territories. On 10 April 1992, a land lot in District A [‘the Lot’] was assigned by one Mr B in favour of the Taxpayer at a consideration of \$100,000. On the same day an application was made in the name of the Taxpayer to the District Lands Office for a licence to build a small house on the Lot.

2. According to a search [‘the Search’] of the Lot placed before us, by two powers of attorney dated 15 December 1992 and 7 June 1994, Mr B was appointed ‘donee’ and ‘the attorney’ presumably in respect of the Lot. The Taxpayer placed no evidence before us in relation to the purport of these two instruments.

3. On 3 April 1993, the Government, under its small house policy for indigenous villagers in the New Territories, granted to the Taxpayer a building licence [‘the Licence’] to erect on the Lot a building of not more than 3 storeys. The Licence contained a provision whereby the Taxpayer was prohibited from assigning or disposing of the building erected on the Lot unless:

- (a) a period of 5 years had elapsed from the date of issue of a certificate of compliance by the District Lands Office; or
- (b) the Taxpayer had paid to the Government a premium to be determined by the District Lands Officer.

4. A small house consisting of G/F, 1/F, 2/F and Roof was erected on the Lot. On 1 March 1994, the District Lands Office issued a certificate of compliance certifying that all the positive obligations under the Licence had been complied with.

5. By letter dated 17 March 1997 signed by Mr B, Mr B applied to the District Lands Officer for transfer of the house on his understanding that the District Lands Office would exact a premium as condition for such transfer. The District Lands Officer gave his consent on 18 May 1994. \$718,900 had to be paid by way of premium on or before 6 June 1994.

6. The Search indicates that a deed of mutual covenant and grant and a management agreement in respect of the Lot were prepared by 22 June 1994. A further sub-deed of mutual covenant and grant was prepared by 29 July 1994.

7. The Taxpayer sold all 3 storeys in the small house. Full particulars of the sales are as follows:

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Unit	Date of sale	Consideration
G/F	31-8-1994	\$2,425,000
1/F	11-7-1994	\$1,407,000
2/F and Roof	12-7-1994	\$1,650,000

8. In correspondence with the Revenue, the Taxpayer made the following assertions through his representative:

- (a) The Taxpayer, being a male native in the New Territories, has a special right to build a small house. The right would be lost if he did not take it. Hence, the small house was built by the Taxpayer rather passively.
- (b) The Taxpayer and his aunt [‘the Alleged Aunt’] had allegedly occupied the 1st and 2nd floors of the small house as a residence until August 1994.
- (c) The following reasons were put forward to explain the sales:

‘[The Taxpayer] found unexpected lonely due to the excess of the house area and therefore he sold the 1/F and 2/F in July 1994. Later in the same year, his driving licence was suspended. It was subsequently found that it is too remote to live in such a village house without a private car.
- (d) The Taxpayer allegedly financed the land cost of \$100,000 out of his personal savings. He allegedly borrowed a loan from ‘joe tong’ to finance the cost of construction of the small house. The assessor requested the Taxpayer’s representative to furnish full particulars of the loan. No particular was given. No document was tendered to substantiate these assertions.
- (e) The sale proceeds were allegedly used to repay the loan raised for the construction of the small house.
- (f) Reliance was placed on the duration whereby the Taxpayer allegedly held the Lot.

9. Two documents were tendered by the Taxpayer’s representative to substantiate his contention that he resided in the small house prior to his disposals:

- (a) The first is a quotation dated 13 May 1994 issued by Company C to a Mr D for decoration of a flat at a total cost of \$110,000. Some of the decoration works were said to relate to demolition of existing structures in the flat. The address of the flat where the alleged decoration works were to be undertaken was not shown on the quotation.

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- (b) The second is an invoice dated 20 May 1994 issued by Company E to a Mr D for the purchase of some electrical appliances. The goods purchased were to be delivered to a unit at District A on 25 May 1994.

10. In his tax returns for the years of assessment 1993/94 to 1995/96, the Taxpayer declared that:

- (a) His residential address was at Area F in District A.
- (b) He had derived the following amounts of employment income:

Year	Amount
1992/93	\$86,890
1993/94	\$121,150
1994/95	\$24,500
1995/96	\$78,000

- (c) He worked as a taxi-driver on night shifts during the year of assessment 1995/96.

11. By a determination dated 23 March 1999, the Commissioner for Inland Revenue took the view that the Taxpayer had embarked on a trading adventure in the construction and sales of the units in the small house. The Commissioner adverted to the following factors:

- (a) The Taxpayer applied for consent to sell the small house shortly after the issuance of the certificate of compliance. This is contrary to his assertion that the small house was built for his residential use.
- (b) The Taxpayer did not retain any of the units for his own use. All the units were sold shortly after lifting of the restriction on alienation.
- (c) The reason given by the Taxpayer for sale of the small house (that is, it is too remote without a private car) does not bear scrutiny given his own status as an indigenous villager living in District A and on his own case the Lot was acquired to build his own residence.
- (d) His case is built on bare assertions. The two documents tendered have scant evidential value.
- (e) Given his employment and his level of income, the Taxpayer did not have the financial ability to hold the small house on a long term basis.

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12. The issue before us is whether the Taxpayer is correctly assessed to profits tax in respect of the gains that he obtained from his dealings with various parts of the small house.

Hearing before us

13. Given the background of this case as outlined above, one would expect a bona fide Taxpayer to appear at the hearing giving detailed evidence on the circumstances of his acquisition, his finance and his aspirations pertaining to the Lot and the small house erected thereon. In the light of the serious challenge by the Revenue, one would further expect documentary evidence to refute the conclusion of the Commissioner.

14. The Taxpayer did not appear at the hearing. He merely authorised a Mr Lau and a Mr Yu to present his case on his behalf. The Board was given no indication as to the precise relationship between these representatives and the Taxpayer. No viva voce or documentary evidence was adduced in support of the Taxpayer's case. His absence was not explained.

15. Mr Lau presented the Taxpayer's arguments. Mr Lau indicated that he was a former officer of the Inland Revenue Department. He gave us an exposition on the right of an indigenous villager to build a small house in the New Territories. He reminded us of the principle that the Taxpayer's intention must be tested at the date of acquisition of the Lot. With respect, in the absence of the Taxpayer, Mr Lau was merely attempting to build a case on straws.

16. The facts are these : the Taxpayer acquired the Lot. He redeveloped the Lot. On completion he resold all the units. This is the classic scenario of a person embarking on a trade. There is not a shred of evidence to support Taxpayer's bare assertion that he purchased the Lot with the view of establishing his residence therein. The Taxpayer failed to discharge the onus resting on him in this appeal. He did not even try.

Our decision

17. We dismiss the Taxpayer's appeal.

18. We are of the further view that this appeal is frivolous and an abuse of the process of this Board. We order the Taxpayer to pay costs in the sum of \$3,500.